DETECTIVE CONSTABLE ARTWELL SIBANDA

And

FELIX TANDI

And

BRAIN MUNYANYI

Versus

BONGANI NCUBE

And

SHERIFF

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 19 & 26 MAY 2022

Opposed Application

Ms Kanema for the applicants
E. Mlalazi for respondent

MAKONESE J: Applicants in this case are leaning on a slender reed. In fact, it take a measure of extreme boldness to bring an application of this nature with the hope that somehow the court would entertain the matter and grant the relief sought.

The application seeks confirmation of an order granted by this court on 23rd September 2019. The terms of the order sought in the final relief are as follows:

> "1. The execution of the writ of execution against moveable property under case number HC 541/18 issued in favour of 1st respondent and against applicants be and is hereby permanently stayed.
>
> 2. Costs on attorney and client scale."

From the onset, the impropriety of the application makes it self –defeating at law. Secondly, the true essence of the application is to delay justice, and to frustrate the enforcement of an order granted way back on 28 February 2019. Thirdly, 2nd and 3rd applicants are not before the court. Only 1st applicant deposed to an affidavit in support of the application. Lastly,

and most importantly, applicants attest that they have no liability to pay in their own capacity yet there is an extant order of the court that relates to them in their individual capacities. The order which is sought to be enforced has not been varied or appealed against. There is really no meaningful argument placed before this court to support thee relief sought.

Background facts

Under case number HC 541/18 respondent instituted legal proceedings against the applicants for damages arising out of wrongful arrest and detention. Respondent was awarded damages in HB-27-19. The judgment remains extant. The applicants chose to do nothing. There has been no attempt to appeal, vary or set aside the judgment. A reading of the record and the judgment reflects that judgment was entered against the applicants jointly and severally, the one paying the other to be absolved. Pursuant to the judgment and from February 2019 when judgment was handed down up to September 2019, the applicants took no action. Only when respondent made an attempt to enforce the judgment by the issuance of a writ of execution, did the applicants spring into action. On 23rd September 2019, this court granted an interim order for a stay of execution. The applicants have not extinguish the judgment debt inspite of the lengthy period before the hearing of this application.

Submissions by the applicants

The applicants argue that under case number HC 541/18 they were sued in their official capacities and not their individual capacities. Applicants place reliance on the provisions of section 6 of the State Liabilities Act (Chapter 8:14). They argue that because respondent gave Notice of Intention to sue then that implies that applicants were being sued in the official capacities as state agents. Applicants contend that applicants could not have been cited in their personal capacities when it is clear that they were carrying out their duties within the course and scope of their employment. Applicants submit that they were cited in their official capacities and that their employer was vicariously liable.

Applicants aver that the respondent maliciously decided to execute the order obtained in case number HC 541/18 against applicants in their personal capacities.

Submissions by respondent

2nd and 3rd applicants not before the court

The respondent takes the point that 2nd and 3rd applicants are not before the court. The question the respondent raises is what the fate of an absentee litigant is. Respondent argues that it takes more than just mere citation for an applicant to institute legal proceedings. In this matter, apart from the mere reference to applicants 2 and 3, these applicants have not filed any papers. They have not shown any involvement in the matter. They have not filed supporting affidavits, neither is there any instrument of authority clothing 1st applicant to depose an affidavit on their behalf. Respondents submit that this is fatal to the proceedings in relation to 2nd and 3rd applicants.

Applicants have adopted the wrong procedure

Respondent avers that the order sought by the applicants is incompetent. The High Court Rules provide a procedure through which any litigant who pleads error on a court order finds redress. Rule 29 of the High Court Rules 2021 is the provision through which applicants ought to have applied to court if the contention is that the aspect of joint and several liability found its way into the court order by an error.

Even if the applicants' allegation is that the court was wrong in ordering liability, jointly and severally, the remedy for the applicants lies not in permanently staying the order but by noting an appeal to the Supreme Court so that the superior court can exercise its appellate jurisdiction to assess whether or not the High Court erred in finding for the respondent in terms of the judgment.

Applicants not sued in official capacity

Respondent submits that the papers clearly show that applicants were not sued in their official capacities. The face of the summons in HC 541/18 shows that only the Minister of Home Affairs was sued in his official capacity. In any event, it is not even the Minister of Home Affairs who participated in the gravamen of what led to the institution of legal proceedings against applicants. The Minister is only sued on the strength of the doctrine of vicarious liability, being the applicants' employer. That doctrine does not in any way preclude anyone from proceeding against both employer and employee.

The issue for determination

The first issue for determination is whether the applicants were being sued in their official capacity in case number HC 541/18. The second issue for consideration by this court is whether the applicants have made any case for the relief sought.

Analysis of the propriety of the application

An application that seeks to temper with an extant order of this court must be made in terms of the law. The act of seeking to set aside or interfere with the order is a drastic action. The process of infringing upon the discretion and decision of the High Court which has since become *functus officio* with respect to substantive orders is a serious issue which is only done in extraordinary circumstances. This is the reason why applicants are seeking to stay the decision of the court without seeking to set aside the order of the court which cannot be stayed as *infinitum*. If the order is stayed then what happens to the order? What becomes of the finding of the court? What recourse has to the holder of legal rights in terms of that order? These questions only lead to the conclusion that the order sought is incompetent. If the application sought to appeal the judgment, then an appeal ought to have been noted with the Supreme Court. The application before this court is an appeal disguised as an application for stay of execution. See *Zimbabwe Posts (Pvt) Ltd* v *Coronation & Allied Services Union* SC-20-16.

An application must be disposed of on the basis of the founding affidavit and not the inscription on the cover of the application. In *Zimbabwe Post (Pvt) Ltd (supra)* GOWORA JA (as she then was) stated at page 5 of the cyclostyled judgment as follows:

> *"The issue that begs the question is how the court a quo should have dealt with the matter given the apparent confusion that had been created by the appellant in settling its papers. An application must be disposed of on the basis of the founding affidavit."*

What countenances itself as an application for stay is in substance on appeal which is lost? It is a lost appeal in the sense that it is in the wrong court at the wrong time. The application is therefore ill-conceived and lacks merit. It goes without saying that nothing can stand on nothing. It is trite that a motion's fate hangs on the strength of its founding affidavit. The learned and eminent authors Herbstein & Van Winsen, *Civil Practice of the Superior Courts in South Africa* 3rd Edition, page 80 aptly provide the position as follows:

> "The general rule however which has been laid down repeatedly is that an applicant must stand or fall by its founding affidavit and the facts alleged therein … If the applicant hereby seeks at a skeleton case in the supporting affidavit any fortifying paragraphs in his replying affidavits will be struck off."

The facts pleaded in the founding affidavit do not support the relief sought. What is sought is merely a stay of execution. It the stay of execution is granted and handing without an end to the whole purpose of the proceedings.

In closing, it is important to highlight that applicants have filed a baseless claim in the hope that execution of the judgment can be delayed and frustrated. In fact the whole purpose and effect of these proceedings is a clear abuse of court process. I may go so far as to say the applicants appear not to have been properly advised in this matter.

Costs of suit

Any litigation is brought to court at a cost. It would be contrary to the dictates of justice for trigger-happy litigants to be allowed to drag innocent respondents to court and then resile from the obligation to compensate them adequately in respect of cots. The respondent has been put out of pocket at the hands of the applicants. This is indeed a case that warrants punitive costs. The application should not have been brought at all.

In the result the court makes the following order:

1. The application be and is hereby dismissed.
2. The applicants are ordered to pay costs on the legal practitioner and client scale.

Civil Division, Attorney-General's Office, applicant's legal practitioners
Dube-Banda, Nzarayapenga & Partners, 1st respondent's legal practitioners